

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-160369
	:	TRIAL NO. B-1506159
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
MOSHEH YATENGA,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Mosheh Yatenga appeals his conviction for one count of felonious assault. The trial court's entry mistakenly indicates that Yatenga was convicted of two counts of felonious assault. We therefore remand the cause so that the trial court can correct its judgment entry, nunc pro tunc. In all other respects, the judgment of the trial court is affirmed.

Yatenga was charged with two counts of felonious assault—one for causing harm to Matthew Moore with a deadly weapon and one for causing Moore serious physical harm. The case was tried to a jury. According to Moore, he and Yatenga, who are brothers, lived in an apartment with their father. One day their father questioned Yatenga about some money that was missing from the apartment. Moore testified that Yatenga took the questioning nonchalantly and with a smile. When Moore joined into the discussion and told Yatenga that it was disrespectful to take their father's money, Yatenga "got in [Moore's] face." Words were exchanged, and

Moore pushed Yatenga away. As Moore tells it, Yatenga came back at him and hit him, and the men began fighting. At some point, Yatenga ran back to his bedroom. Fearing that Yatenga was going to grab a knife, Moore attempted to leave the apartment. Yatenga caught up with him and stabbed him twice in the back. He also cut Moore's face and neck. Eventually, Moore was able to grab the knife from Yatenga, suffering a wound to his hand as a result.

At the close of the evidence, Yatenga requested an aggravated assault instruction, contending that the evidence warranted it. The trial court denied Yatenga's request. The jury found Yatenga guilty of felonious assault with a deadly weapon (R.C. 2903.11(A)(2)) and not guilty of felonious assault causing serious physical harm (R.C. 2903.11(A)(1)). The trial court imposed a six-year sentence. The judgment entry, however, incorrectly indicates that Yatenga was found guilty of and sentenced for both counts of felonious assault.

Yatenga's first assignment of error is that the court erred when it refused to instruct the jury on aggravated assault, an inferior degree of felonious assault. "Requested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested instruction." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240. We review the trial court's refusal to give the requested instruction for an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

Under R.C. 2903.12(A), a person is guilty of aggravated assault if he "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, * * * knowingly * * * [c]ause[s] serious physical harm to another[.]" To be reasonably sufficient to incite the use of deadly force, provocation "must be sufficient to arouse the passions of an ordinary

person beyond the power of his or her control.” *State v. Shane*, 63 Ohio St.3d 630, 635, 590 N.E.2d 272 (1992). Here, the evidence showed that Moore merely pushed Yatenga away before the two men engaged in a mutual fight. We conclude any provocation on Moore’s part did not mandate an instruction on aggravated assault. The court did not abuse its discretion when it refused to give the instruction. The first assignment of error is overruled.

The second assignment of error is that the court erred when it denied Yatenga’s Crim.R. 29 motion for an acquittal. But Yatenga moved for an acquittal only on the count that alleged felonious assault causing serious physical harm. He did not argue that he was entitled to an acquittal on the charge for which he was convicted. He therefore forfeited any issue about whether an acquittal should have been granted. The second assignment of error is overruled.

In the final assignment of error, Yatenga asserts that his conviction for felonious assault was not supported by sufficient evidence and was against the weight of the evidence. We disagree. Yatenga was convicted of violating R.C. 2903.11(A)(2), which provides that “[n]o person shall knowingly * * * [c]ause * * * physical harm to another * * * by means of a deadly weapon[.]” Our review of the record reveals that the state adduced substantial, credible evidence from which the jury could have reasonably concluded that the state had proved beyond a reasonable doubt the elements of felonious assault. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. And in regard to the manifest-weight argument, our review of the entire record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse Yatenga’s conviction and order a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). The third assignment of error is overruled.

Because the judgment entry incorrectly indicates that Yatenga was convicted of both counts of felonious assault, we remand the cause so that the trial court can correct its entry. *See* Crim.R. 36. The judgment of the trial court is otherwise affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on November 23, 2016
per order of the court _____.

Presiding Judge